INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXIX, NO. 18 **June 14, 2002**

CRIMINAL LAW ISSUES

HENDERSON v. STATE, No. 49S00-0010-CR-616, ___ N.E.2d ___ (Ind. June 6, 2002).
DICKSON, J.

As to the murder count, the information charged that Henderson killed Reynolds while committing or attempting to commit robbery (taking U.S. currency from Michael Cornner by putting Cornner in fear or by using or threatening to use force). As to the conspiracy count, the information specified the intended robbery to be the taking of United States currency from Michael Cornner, it named the resulting serious bodily injury as "a gunshot wound" to Reynolds's back, and for the overt act alleged that Henderson "took possession of said handgun and placed it against the side of Michael Cornner." Record at 125. In the present case, the evidentiary facts that established the essential elements of felony murder did not also establish the "agreement" element of conspiracy. Similarly analyzing the evidentiary facts that may have been used to establish the essential elements of class A felony conspiracy, such facts did not also establish that the defendant committed or attempted to commit robbery, one of the elements of the charged felony murder. It is less clear whether the evidentiary facts used to establish all the essential elements of conspiracy to commit robbery may also have been used to establish all the elements of felony murder. The evidentiary fact that established the resulting serious bodily injury as described in the court's elements instruction (which was broader than the charging information) was likely the death of Reynolds, which would also have proven the resulting death element of felony murder. Furthermore, it may initially appear that the evidentiary facts proving the charged overt act (Henderson placed a handgun in the Cornner's side) *could* have used to establish *attempted* robbery, one possible basis for felony murder under the court's instruction as to the elements of felony murder. It is significant, however, that the jury found the defendant

guilty as to Count 3, robbery (which the trial court merged with Count 1, felony murder), demonstrating that the jury found the robbery to have been completed, rather than just attempted. The evidentiary facts proving class A felony conspiracy to commit robbery did not also establish the *completed* robbery used by the jury to establish felony murder. We conclude that it is not reasonably possible that the jury used the same evidentiary facts to establish all the elements of both class A felony conspiracy to commit robbery and felony murder (the defendant killed Reynolds while committing the robbery of Cornner). In other words, the offenses of felony-murder and class A felony conspiracy were each established by the proof of a fact not used to establish the other offense. . . .

We note, however, that this appeal was initiated and the Brief of Appellant was filed before this Court issued its clarifying opinions in Redman [v. State, 743 N.E.2d 263 (Ind.

2001)] and Spivey [v. State, 731 N.E.2d 831 (Ind. 2002)]. Furthermore, Spivey expressly acknowledges that, apart from a state constitutional claim of double jeopardy under Richardson, similar relief may be obtained under a series of rules of statutory construction and common law. [Citation omitted.] . . .

We therefore elect, *sua sponte,* to review the defendant's claims under these rules of common law and statutory construction. Among these is the doctrine that where one conviction is based on the same bodily injury that forms the basis for elevating another conviction to a higher penalty classification, the two cannot stand. [Citations omitted.] . . .

The defendant's claim qualifies for consideration under this doctrine. The death of Reynolds was the basis for his convictions of both murder and class A felony conspiracy. The defendant argues that it would be proper to reduce his conspiracy conviction from a class A felony to a class B felony. Class B felony conspiracy to commit robbery requires the offense to be committed while armed with a deadly weapon. [Citations omitted.] The defendant's conspiracy conviction was based on the use of a handgun. In this way, his murder conviction would not be based on the same bodily injury that forms a basis for elevating his conspiracy conviction. We agree that his conspiracy conviction should be reduced to a class B felony.

. . . .

SHEPARD, C. J., and BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

LEWIS v. STATE, No. 02A05-0112-CR-534, ___ N.E.2d ___ (Ind. Ct. App. June 6, 2002).
ROBB, J.

In his motion to dismiss the habitual offender allegation as it pertained to the unlawful possession [of a handgun] by a SVF [serious violent felon] charge, Lewis contended that the unlawful possession by a SVF charge is part of a progressive punishment scheme and that it is improper to further enhance the charge by an habitual offender finding. The trial court agreed. . . . . .

. . . .

A person convicted of unlawful possession by a SVF is not convicted of an enhanced crime, and we therefore hold that, in circumstances in which the felony convictions used to classify the defendant as a serious violent felon and to classify him as an habitual offender are different, there is no impediment to imposing an habitual offender enhancement upon a sentence for unlawful possession by a SVF.

. . . .

In this case, the trial court stated at the sentencing hearing that it was enhancing the Class D felony resisting law enforcement sentence by the habitual offender finding because it did not believe that it could enhance the sentence for unlawful possession by a SVF. Had the trial court merely enhanced the resisting law enforcement conviction without stating its reasons, we would find no abuse of discretion, because it is clearly within the trial court's

discretion to enhance whichever felony conviction it sees fit. However, the record leaves us unsure whether the trial court would have imposed the same sentence had it understood that it could do otherwise. We therefore remand to the trial court for re-sentencing consistent with this opinion.

. . . .

BAILEY and NAJAM, JJ., concurred.

BRANTLEY v. STATE, No. 71A05-0111-PC-511, ___ N.E.2d ___ (Ind. Ct. App. June 11, 2002).
RILEY, J.

On May 30, 2001, this court reversed Brantley's conviction, holding that "because the prosecution presented evidence of two separate acts while charging Brantley with only one count, we were unable to determine whether the jury reached a unanimous verdict." [Citation to Brief omitted.] . . .

Pursuant to the trial court's order, Brantley paid the St. Joseph County Community Corrections Center a total of $2, 415.00 from the time she was sentenced until the time her conviction was vacated. On July 5, 2001, Brantley filed her Motion to Refund Fees and Costs. On September 10, 2001, the trial court denied her Motion to Refund Fees and Costs. . . .

. . . .

Brantley maintains "a defendant cannot be required to pay fees for community corrections services when her conviction and sentence have been vacated." [Citation to Brief omitted.] . . . Brantley asserts that wrongly served incarceration cannot be undone, but the fees she was required to pay for community corrections services and court costs can be undone by refunding them to her.

. . . .

In this case, we find that Brantley benefited from the fees she paid to the St. Joseph's County Community Corrections Center. In return for the fees Brantley paid, she received supervisory services. Presumably, she received or could have received some rehabilitative benefit from these services. Additionally, Brantley avoided incarceration with her placement and chose not to pursue a stay of her sentence pending appeal.

On the other hand, the community corrections program expended time and resources to provide these supervisory services to Brantley. To refund these fees to Brantley would be inequitable to the community corrections program, as it would not be compensated for the benefits derived by Brantley from the program's service.

[I]t is our determination that the trial court did not abuse its discretion when it denied Brantley's Motion to Refund Fees and Costs, as Brantley received benefits from the community corrections program. Her placement in the community corrections program was a privilege, not a right. [Citation omitted.] Thus, the fees that Brantley paid were correct.

. . . .

MATTINGLY-MAY and VAIDIK, JJ., concurred.

LAUGHNER v. STATE, No. 82A01-0104-CR-141, ___ N.E.2d ___ (Ind. Ct. App. June 12, 2002).

DARDEN, J.

[I]ndiana State Police detective Joel Metzger, based in Evansville, was working as part of the Crimes Against Children Unit. Metzger "entered" computer chat rooms on the internet and portrayed himself as a child, thus available to be solicited for sex by adults. . . .

On that evening, Laughner found Metzger in the chat room and asked a series of

questions about his sexual experiences; he again indicated his desire to talk to Metzger on the telephone. . . .

During the next few weeks, Laughner attempted to talk with Metzger three or four times by sending brief instant messages saying "hi or hello." [Citation to Transcript omitted.]

. . . .

On the morning of August 11, 2000, Laughner contacted Metzger and asked, "u wanna get off?" (Tr. Ex. 5). Metzger said, "when?" and Laughner replied, "today." Id. Metzger asked if Laughner was "serious" about "com[]ing down here," and Laughner answered, "i am very serious," and added "today?" Id. Laughner said, "i will come down," that he could

be there "around 2," and they arranged to meet at the Bigfoot gas station. [Citation to Transcript omitted.] . . .

Laughner arrived at the Bigfoot station at 1:57 p.m. When confronted by Metzger, Laughner admitted that he was "Tret6128." Subsequently, Metzger advised Laughner of his Miranda rights; Laughner signed a statement indicating he understood his rights, waived them, and was willing to answer questions and make a statement without a lawyer. . . .

The State initially charged Laughner with attempted child solicitation, a class C felony . . . . . .

. . . .

The child solicitation statute [IC 35-42-4-6] is a specific one, whereas the attempt statute [IC 35-41-5-1] is one of general applicability. No statutory language forbids there being an attempt offense in the case of the crime of solicitation. [Footnote omitted.]

. . . .

The foregoing provisions of Indiana statutory and common law suffice to support the existence of the crime of attempted child solicitation in the case of one who engages in an overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out the solicited person is an adult.

. . . .

Laughner next contends that a material element of the crime of attempted child solicitation over the internet is the existence of "an actual child under the age of fourteen," and therefore, "one cannot be convicted of the attempted solicitation of an adult police officer posing as a child because of the failure to establish a material element of the offense." [Citation to Brief omitted.] . . .

. . . .

The attempt statute expressly provides, "It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted." [Citation omitted.] . . .

Here, the State alleged that Laughner's conduct established that he had done all that he believed necessary to have solicited a child under fourteen, and that the evidence showed that conduct to include a substantial step toward solicitation of a child under fourteen. The fact that it was not "actually possible," [citation omitted], because Metzger was not a child, does not bar his conviction for an attempted child solicitation. [Citation omitted.]

. . . .

Laughner next argues that the statute violates the Proportionality Clause of the Indiana Constitution because it punishes the attempted solicitation of a child on the internet, a class C felony, more severely than the face-to-face solicitation of an actual

child, a class D felony. . . .

Although on its face the differing penalty for the two crimes noted by Laughner is somewhat troubling, we are not free "to set aside the legislative determination as to the appropriate penalty merely because it seems too severe." [Citation omitted.] . . . [T]he statutory scheme may reflect a legislative determination that the internet crime was indeed a more serious crime. [Citation omitted.] Such reasoning leaves us unable to justify striking down the legislative determination as to the appropriate penalty for the internet solicitation of a child.

Laughner asserts that venue for the offense was not proper in Vanderburgh County "when the sole basis of the charge was that [he] committed the offense simply by typing

the message 'u wanna get off?' into his computer in Marion County." [Citation to Brief omitted.] . . .

. . . Here, Laughner admittedly sent the communication of August 11 to LLuke12 in Evansville, which is in Vanderburgh County. Further showing "action directed at" Vanderburgh County are the facts that he (1) arranged a meeting in Evansville in furtherance of the attempt that was the subject of the conversation, and (2) did immediately travel to that county. Because the charge involved action taken by him directed at Vanderburgh County, that county had venue to try him.

. . . .

Next, Laughner argues that the trial court "abused its discretion in admitting the alleged instant message chats between [him] and the state trooper posing as a child because the text of the alleged chats was not an 'original' preserved by the AOL logging feature but rather a cut-and-pasted copy into a word-processing program, which allowed for editing and tampering." [Citation to Brief omitted.] He cites Indiana Evidence Rules 1002 and 1001(3), and contends the admitted documents "were not 'originals' within the meaning of those rules." [Citation to Brief omitted.]

. . . .

[E]vidence Rule 1001(c) provides that when "data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.'" According to Metzger, he saved the conversations with Laughner after they were concluded, and the printout document accurately reflected the content of those conversations. Therefore, the printouts could be found to be the "best evidence" of the conversations between Metzger and Laughner, and their admission would not be an abuse of discretion.

. . . .

BAILEY and SHARPNACK, JJ., concurred.

WALKER v. STATE, No. 45A05-0105-PC-228, ___ N.E.2d ___ (Ind. Ct. App. June 12, 2002).

DARDEN, J.

On the night of April 22, 1991, Jose Moore was working the midnight shift as a security guard at the apartment complex. . . . At approximately 3:00 a.m., Robin Hardeway, a close friend of the Moore family, brought Moore some food and a glucometer for his diabetes. While they were inside the security booth, Walker and Michael Wrencher approached them. . . . Walker stepped back, handed a gun to Wrencher, and began to smile. Wrencher proceeded to place the gun inside Hardeway's jacket and fired two or three shots. . . .

. . . .

During trial, Final Instruction Number 13 was tendered to the jury as follows:

It is a fundamental principle of law that where two or more persons engage in the commission of an unlawful act, each person is criminally responsible for the actions of each other person which were a probable and natural consequence of

their common plan even though not intended as part of the original plan. . . .

[Citation to Brief omitted.] Walker did not object to this instruction.

In his brief, Walker argues that the post-conviction court erroneously found that Final Instruction Number 13 was a correct statement of the law on accomplice liability. . . .

. . . .

Walker argues that this instruction "would doubtlessly have convinced reasonable jurors that they were required to presume the accused nonshooter (Walker) had the same intent as the shooter (Wrencher) unless Walker persuaded them otherwise." [Citation to Brief omitted.]

. . . .

Applying the analysis from the preceding line of cases to the facts of the instant case, we find that a reasonable juror could have understood Final Instruction Number 13 as a mandatory presumption that shifted to Walker the burden of proving his intent to commit the crimes charged when he handed the gun to Wrencher. . . .

. . . .

MATHIAS and VAIDIK, JJ., concurred.

CIVIL LAW ISSUES

DUNSON v. DUNSON, No. 34S02-0108-CV-370, ___ N.E.2d ___ (Ind. June 12, 2002).
BOEHM, J.

This case addresses the emancipation of a minor child who is not under the care or control of either parent. We hold that for a child to be emancipated pursuant to Indiana Code section 31-16-6-6(b)(3), the child must not only be under the care or control of neither parent, but the child must also (1) initiate the action putting the child outside the parents' control and (2) in fact be self-supporting.

. . . .

Chad has not lived with his mother since he was 15 years old. In the fall of 1996, at the start of Chad's freshman year in high school, Chad and his brother moved to the home of an aunt. In the fall of 1997, Chad moved to the home of Brenda Hembree, another aunt, where "he still resides today." Neither parent has had physical custody, care, or control of Chad since the fall of 1996. The parents have provided Chad with little support since August 11, 1998, [footnote omitted] and Chad has been dependent on his aunts for shelter, clothing, food, and parental supervision. Since the fall of 1996, Terry and Teresa have acquiesced in Chad's living arrangements with his maternal aunts, and neither parent has taken steps to exercise any parental rights under their agreed "joint custody." . . .

. . . .

[T]he Court of Appeals . . . found subsection (b)(3) controlling:

> Recognizing that past decisions have addressed the emancipation question in terms of a child placing himself beyond the parental custody and his ability to support himself without parental assistance, we nevertheless conclude that section 31-16-6-6(b)(3)(A) unambiguously requires only that a child not be under the care or control of either parent to be found emancipated under Indiana law.

Dunson, 744 N.E.2d at 968-69. The Court of Appeals therefore affirmed the trial court's conclusion that Chad became emancipated by putting himself outside the care and control of his parents.

We disagree with the Court of Appeals' holding that emancipation requires only that a child not be under the care or control of either parent. Rather, we reaffirm the longstanding

view that emancipation requires that (1) the child initiate the action putting itself outside the parents' control and (2) the child in fact be self-supporting.

. . . We believe the legislature's intent in enacting the emancipation statute is to require that parents provide protection and support for the welfare of their children until the children reach the specified age or no longer require such care and support. Reading subsection (b)(3) in isolation to permit emancipation of children who are no longer under parents' care or control conflicts with this underlying purpose. If this "automatic emancipation" is permitted, parents are permitted to "divorce their children" and avoid paying child support simply by sending their children to live with a third party or, worse yet, just throwing the child out of the house.

. . . .

The view that emancipation requires that "the child place herself" beyond the parents' control has been frequently assumed or restated since subsection (b)(3) was enacted. Subsequent case law has also maintained the self-supporting component of emancipation in interpreting the emancipation statute. [Citations omitted.] . . .

[W]e find Chad was not emancipated. Although the trial court found that it was Chad's sole decision to live with the aunt, he was not in fact supporting himself. The trial court found that Chad has worked part-time jobs since living with Hembree, but his income has been less than $2,000 per year. The trial court also found that Chad "has been dependent on his extended family since the Fall of 1996 for shelter, clothing, food, and parental supervision." We cannot say Chad was supporting himself.

Although this case does not present the issue, we add that we do not mean to suggest that the child may create an obligation of the parents to provide financial support outside the home by refusing support available within the structure of the residence of the family or a single parent. Put another way, we are not suggesting that a child who leaves the familial residence to escape customary parental supervision is entitled to enlist the aid of a court in obtaining an order for support. If anything, the parents in such a case could insist that the child be ordered home to take advantage of the available support, subject to ordinary supervision.

The legislature amended the statutes governing child custody proceedings in 1999 to provide for "de facto" custodians.[4] Chad argues that Hembree was required to be joined as a de facto custodian by the trial court pursuant to section 31-17-2-8.5.[5] That section provides, "If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding." [Citation omitted.] Chad requests that child support be assessed against each parent retroactive to August 11, 1998 and made payable to Hembree, as custodian.

The Court of Appeals held that Chad waived this argument by failing to raise it in the trial court. Dunson, 744 N.E.2d at 970. Chad did submit a "Final Argument Memorandum of Law" in support of his proposed Findings of Fact and Conclusions of Law to the trial court. In that memorandum, he mentioned the absence of the de facto custodian, but at no point did he move to join Hembree as an indispensable party or to dismiss the action for lack of an indispensable party. In the first place, it is not clear that the de facto custodian statute applies in this case. The de facto custodian provisions Chad cites are included in the statutes governing paternity and child custody and visitation, not child support proceedings. [Footnote omitted.] Regardless of the resolution of that issue, we think that in order to preserve the issue for appeal, Chad was required to move, pursuant to Trial Rule 19, to join Hembree or dismiss for lack of an indispensable party. [Citations omitted.]

. . . .

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[4] A de facto custodian is defined, in relevant part, as a person "who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least . . . one (1) year if the child is at least three (3) years of age." Ind. Code § 31-9-2-35.5 (Supp. 1999).

[5] Chad cites section 31-14-13-2.5 throughout his argument that Hembree is a de facto custodian. That section defines de facto custodian in the context of establishing paternity. We cite the identically worded statute, section 31-17-2-8.5, because article 17 deals with custody and visitation rights and seems a more likely candidate in this case.

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

JACOBS v. MANHART, No. 20A03-0107-CV-238, ___ N.E.2d ___ (Ind. Ct. App. June 5, 2002).

SULLIVAN, J.

The Boggs [v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000), reh'g denied.] Court further acknowledged the Court of Appeals' concern over the possibility of plaintiffs

discovering malpractice claims within a very short time before the expiration of the limitation period, but stated that the issues associated with such last minute discoveries would be best addressed on a case-by-case basis. 730 N.E.2d at 697-98. From this, the Court seems to suggest that the occurrence-based statute of limitation may be unconstitutional as applied to plaintiffs who make the "hypothetical eve of midnight discovery." Id. at 698. Our review of case law indicates that this issue has yet to be precisely addressed.

The implication of Martin [v. Richey, 711 N.E.2d 1273 (Ind. 1999)], Van Dusen [v. Stotts, 712 N.E.2d 491(Ind. 1999)], and Boggs is that the determination of when a plaintiff discovered or should have discovered the malpractice and resulting injury is key to deciding the constitutionality of the occurrence-based statute of limitation as applied to a particular plaintiff. In situations where plaintiffs cannot reasonably be expected to discover the alleged malpractice until after the limitation period has expired, the occurrence-based statute of limitation is unconstitutional as applied and is replaced with a judicially created discovery-based statute of limitation. See Van Dusen, 712 N.E.2d at 493. Under another set of circumstances, wherein plaintiffs who discover the alleged malpractice and resulting injury within the two-year occurrence-based limitation period and have a reasonable amount of time in which to file their claims, the occurrence-based statute of limitation is constitutional as applied. See Boggs, 730 N.E.2d at 696-97.

. . . .

Applying the above reasoning to the facts presented in the case before it, the Van Dusen Court determined the discovery date to be when, in response to plaintiff's questions, his doctor indicated that there was "a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time . . . ." [citation omitted]. . . .

[M]s. Manhart had a history of severe dysplasia, a serious condition for which she was treated and directed to monitor by getting routine PAP smears. Ms. Manhart closely monitored her condition, and up until August 24, 1999, when she was diagnosed with cervical cancer, there is no evidence that Ms. Manhart had any information, which in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury. Indeed, prior to such diagnosis, Ms. Manhart reasonably assumed that her PAP smear slides had been properly read. Only after being diagnosed with cervical cancer and learning of the advanced stage of the disease did Ms. Manhart possess information which would even give rise to the "suspicion or speculation [of malpractice] by a plaintiff who is without technical or medical knowledge." [Citition omitted.]

Unlike Van Dusen, where the plaintiff's doctor advised the plaintiff that there was a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time, here there was no such advice. Rather, Ms. Manhart had to first hear the diagnosis of tumor and advanced stage cancer, wait for the confirmation, and undergo a radical hysterectomy and the attendant recovery. She then acted with appropriate dispatch in seeking first an informal opinion and then a formal medical opinion. When that

opinion was received, she commenced this proceeding within thirty-three days.

. . . Where, notwithstanding the exercise of appropriate diligence, the plaintiff first becomes aware of a malpractice claim shortly before the expiration of the limitation period, the issue becomes whether the plaintiff faced "the practical impossibility" of asserting the claim before the limitation period expired. [Citation omitted.] What is practical impossibility must be addressed on a case-by-case basis. Here, looking at the totality of the circumstances giving rise to this claim, [footnote omitted] we conclude that it was a practical impossibility for Ms. Manhart to assert her claim before the expiration of the limitation period and that rigid application of the occurrence-based statute would deny her the meaningful opportunity to pursue her claim. Accordingly, we affirm the trial court's determination that Ms. Manhart's claim was not barred by the statute of limitations.

. . . .

KIRSCH and ROBB, JJ., concurred.

FUEHRER v. TOWN OF LIZTON, No. 32A01-0108-CV-298, ___ N.E.2d ___ (Ind. Ct. App. June 6, 2002).

KIRSCH, J.

Landowners assert that the Ordinances met the contiguity requirements of the annexation statute because each parcel was contiguous to the one annexed immediately prior to it. Remonstrators, on the other hand, focus on the fact that Parcels Two through Five were not contiguous to the Town at the time the ordinances were adopted. IC 36-4-3-4(a) states that a legislative body of a municipality may by ordinance annex territory that is contiguous to the municipality. [Footnote omitted.] . . .

Landowners point to *Catterlin v. City of Frankfort*, 87 Ind. 45 (1882), which they contend authorizes a municipality to serially annex several parcels of land which do not each adjoin the municipality if the first of them does. . . .

. . . .

These cases, however, are inapposite because they refer to a single parcel, composed of the land of multiple owners, being annexed in a single ordinance. This situation is not analogous to the question before this court, which involves different parcels being annexed by different ordinances.

We begin our analysis by looking to IC 36-4-3-7 and the reasoning of this court in *Delph* [*v. Town Council of Town of Fishers*, 596 N.E.2d 294(Ind. Ct. App. 1992)] for guidance as to the proper resolution of this case. In 1998, IC 36-4-3-7 provided that an annexation ordinance takes effect at least sixty days after its publication. Relying on this statute, we have held that an annexation ordinance becomes effective after the period for remonstrance has passed or any remonstrances have been resolved. [Citation omitted.] . . .

We faced a similar issue in *Delph*, 596 N.E.2d at 298. There, the Town of Fishers annexed Parcel One, which was contiguous to Fishers, by an ordinance adopted in February 1990. No remonstrance was filed within the statutory period, and the ordinance was not recorded until August 1990. Meanwhile, in July 1990, Fishers passed another ordinance annexing property that was contiguous to Parcel One, but not to Fishers.

Some landowners challenged the contiguity of Parcel Two to Fishers, claiming that the February 1990 annexation was void because it was not recorded within ninety days of the expiration of the time period permitted for remonstrance or appeal, as required by IC 36-4-3-22. The landowners argued that the February annexation was invalid when the July annexation took place and, therefore, Parcel Two was neither contiguous to Fishers nor validly annexed. In resolving this claim, we looked to IC 36-4-3-22(c), which states that failure to record an annexation ordinance does not invalidate it. We held that the trial court

properly determined annexation is complete when the remonstrance or appeal period ends with no remonstrance or appeal being filed, and that Parcel One was therefore properly and legally annexed to Fishers prior to the annexation of Parcel Two. [Citation omitted.]

The inference from the court's reasoning is that had the February annexation ordinance not been final prior to the July annexation ordinance being adopted, Parcel Two would not have been contiguous. Thus, *Delph* supports Remonstrators' position that Parcels Two through Five were not contiguous to the Town when the ordinances purporting to annex them were passed.

We find this interpretation persuasive. Accordingly, we hold that the annexation of Parcel One was not complete until the statutory period for filing remonstrances had passed. At that point and not before, Parcel One became a part of the Town, and land contiguous to

it but not to other parts of the Town became eligible for annexation to the Town. Because the Town attempted to annex Parcels Two through Five prior to the end of the remonstrance period for the first ordinance annexing Parcel One, its attempt was invalid. Accordingly, we hold that the Ordinances annexing Parcels Two through Five are void, and such parcels are not a part of the Town.

. . . .

ROBB and SULLIVAN, JJ., concurred.

CASE CLIPS TRANSFER TABLE

June 14, 2002

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	5-24-02. 768 N.E.2d 437. School decision that expulsion alone was not enough of a deterrent to drug possession was reasonable basis for denying credit.
Reeder v. Harper	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	Materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-9-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-9-01	735 N.E.2d 269, April 5, 2002. Cause issue waived by failure to use peremptory
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	763 N.E.2d 960, 3-5-02. Ind. Const. does not prohibit sobriety checkpoints, but here, the checkpoint failed to meet constitutional requirements.

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-2-01	
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-6-01	
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).	5-10-01	5-10-01. 767 N.E.2d 967. Error did not require reversal.
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated wash-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	

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Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	5-08-02. 767 N.E.2d 535. Vehicle is "under insured" if amount available to ay insured from tortfeasor's bodily injury liability policies is less than limits on insured's underinsured coveage.
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	Apr. 22, 2002. 766 N.E.2d 699. Wage Payment Statute governs both frequency and amount of payment.

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Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	6-12-02. No. 34S02-0108-CV-370. Child must leave parental care or control on his own and must be able to support himself.
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	
Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne	747 N.E.2d 638 02A04-0005-CV-219	Restaurant was subject to exception to City's anti-smoking ordinance.	9-20-01	
Hall Drive Ins, Triangle Park v. City of Fort Wayne	747 N.E.2d 643 02A03-0005-CV-189	Companion case to *Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne*, above	9-20-01	
Hinojosa v. State	752 N.E.2d 107 45A05-0010-CR-450	Third party may obtain grand jury transcripts based on statutory "particularized need," as here with police officer "whistleblower."	11-15-01	

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Bowers v. Kushnic	743 N.E.2d 787 45A04-0004-CV-168	Under rule that, if the insured has done everything within her power to effect the change of beneficiary, substantial compliance with policy requirements can be sufficient to change the beneficiary, facts were not sufficient to show intent to change.	11-15-01	
Family and Social Services Admin. v. Schluttenhofer	750 N.E.2d 429 No. 91A02-0010-CV-638	Payment for medical expenses from injured's employer's policy was subject to IC 34-51-2-19 proportionality reduction of Medicaid lien.	11-15-01	5-23-02. Medical insurance policy was contractual and unrelated to negligence of other parties, and so it was not subject to lien.
Poananski v. Hovath .	749 N.E.2d 1283 No. 71A03-0101-CV-34	For summary judgment, the very fact that a dog bit a human without provocation is evidence from which a reasonable inference can be made that the dog had vicious tendencies, and it may be further inferred that if the dog had vicious tendencies based on this one incident, then a question of fact exists as to whether the dog owner knew or should have known of these tendencies	11-15-01	
Stegemoller v. AcandS, Inc.	749 N.E.2d 1216 No. 49A02-0006-CV-390	Wife of insulator who worked with asbestos did not qualify as a "bystander" who was reasonably expected to be in the vicinity of the product "during its reasonably expected use," and thus, she could not recover under Indiana Product Liability Act (IPLA).	11-15-01	5-17-02. 767 N.E.2d 974. Expected use of asbestos insulation included fibers from it, so wife of installer was a "bystander" with fibers he brought home.
Ringham v. State	753 N.E.2d 29 No. 49A02-0009-CR-577	Reversible error not to have complied with Marion Superior statute which required an elected judge return to handle trial when prompt objection was made to master commissioner's presiding.	12-13-01	5-29-02. No. 49S02-0112-CR-642. Best to have put commissioner's appointment as pro tem contemporaneously in CSS, but trial judge found appointment was made, so special statute for commissioner did not apply when commissioner was pro tem.
Ratliff v. State	753 N.E.2d 38 No. 49A02-0010-CR-677	At scene of fleeing suspect's auto crash, police could have searched vehicle under either lawful arrest or "fleeting evidence" auto exceptions to warrant requirement, but after vehicle had been taken to police station to be searched neither exception continued to apply and warrant or lawful inventory search was required.	12-20-01	
Becker v. Kreilein	754 N.E.2d 939	Summary judgment not proper as whether negligent work by neighbor's sewer contractor breach a duty to plaintiff was a jury question; also issues of fact on acceptance of contractor's work prevented summary judgment claim against contractor.	2-22-02	

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Garner v. State	754 N.E.2d 984	Child molesting allegation in a 5-month period sufficiently specific. Pre-trial discover of evidence provided adequate notice of charge. Evidence of other molestings of same child in 5-month period not "other wrongs" evidence subject to 404(b).	2-22-02	
Wal-Mart Stores, Inc. v. Wright	754 N.E.2d 1013	No error in instructing that violations of defendant's safety manual were proper evidence on degree of care defendant considered ordinary care.	2-22-02	
Stonger v. Sorrell	750 N.E.2d 391	Admission of custody evaluations later shown to have been fraudulent required new trial, even though party presenting them may not have had intent to defraud the court and trial court itself concluded fabrication did not count for much.	2-22-02	
Meeks v. State	759 N.E.2d 1126	Defendant not entitled to an instruction that jury had "latitude to refuse to enforce the law's hashness when justice so requires."		
City of South Bend v. Kimsey	751 N.E.2d 805	Annexation statute applicable to any county with prescribed population limits not "special legislation"	3-15-02	
Allen .v Great American Reserve Insurance Co.	739 N.E.2d 1080	Statutory and negligence claims preserved by Journey's Account; no recovery under misrepresentation statutes	4-02-02	Contract and misrepresentation choice of law issues resolved.
Sanders v. State	759 N.E.2d 278	No fundamental error and no ineffective assistance.	4-03-02	765 N.E.2d 591, 4-03-02. Result reached by Court of Appeals was correct but fundamental error claim should not have been reviewed in this post-conviction relief action
Fobar v. Vonderahe	756 N.E.2d 512	Evidence insufficient to support attorney fee award in divorce and 50/50 split unwarranted: 1) for horses owned by wife but paid for with daughter's social security; 2) for half share of auto owned by daughter after payment to mother; 3) for auto in wife/mother's name with evidence suggesting auto bought with daughter's safety deposit account; real property wife brought to marriage and never commingled should not have have been considered marital property	4-05-02	
Groce v. State ex rel. Newman	757 N.E.2d 694	Considers habitual traffic offender statute amendments to reverse *Stewart v. State*, 721 N.E.2d 876, so that failure to include notice of judicial review right made license suspension ineffective	3-21-02	

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Kincaid v. State	750 N.E.2d 713	When defendant had served 636 days on probation before obtaining post-conviction relief vacating conviction, it violated double jeopardy not to credit those days against the new sentence imposed after he was re-convicted.	4-26-02	
Abney v. State	758 N.E.2d 72	Instruction for OWI resulting in death must state that defendant's conduct has to have been a "substantial cause" of death; error to instruct it was "contributing cause."	4-26-02	4-26-02. 766 N.E.2d 1175; 49S02-0204-CR-255. Statute requires that defendant have been "proximate cause" of death.
Bushong v. Williamson	760 N.E.2d 1090	A complaint alleging on its face that the act on which suit is based was within the scope of employment cannot support a suit against a government employee personally; here, the absence of any "within the scope of" allegations meant that personal liability for the employee was not foreclosed and "within the scope of" was a jury issue; trial court may not look past the complaint itself in resolving the "within the scope of" issue.	5-3-02	
Brazauskas v. Fort Wayne-South Bend Diocese	755 N.E.2d 201 71A03-0102-CV-55	First Amendment precludes subject matter jurisdiction when resolution of a claim would require inquiry into matters of religious doctrine; here, as church doctrine required close communication and cooperation between Catholic university and local diocese and mandated diocese approval of pastoral activities at university, diocese-to-university communications "could have had a doctrinal basis" so that First Amendment closed the courts to claims of blacklisting and of tortious intereference with business relationship brought by former diocese employee who alleged diocese prevented her employment at university.	5-03-02	
Bunch v. State	760 N.E.2d 1163 79A02-0105-PC-338	State failed to preserve post-conviction waiver defense when, notwithstanding its having asserted waiver in its answer, it failed to argue the waiver issue at the PCR hearing.	5-23-02	

CASE CLIPS is published by the
Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
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